(2)

Supreme Court, U.S.
FILED
APR 12 1996
CLERK

No. 95-1470

In the Supreme Court of the United States
October Term, 1995

Central States, Southeast and
Southwest Areas Pension Fund,
Petitioner,

v.

The Sherwin-Williams Company,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RONALD LEO KAHN *Counsel of Record*
HAROLD H. READER III
PATRICIA A. SHLONSKY
GREGORY A. GORDILLO
Ulmer & Berne P.L.L.
1300 E. 9th St., #900
Cleveland, Ohio 44114
Telephone 216-621-8400

RON M. TAMBURRINO
The Sherwin-Williams
Company
101 Prospect Avenue
Cleveland, Ohio 4415

MITCHELL A. ORPETT
of Counsel
Tribler & Orpett, P.C.
30 North LaSalle St. #2200
Chicago, Illinois 60602

Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO. CLEVELAND, OHIO 216-621-5647

83pp

QUESTION PRESENTED

Sherwin-Williams and its subsidiaries, including Lyons, Dupli-Color and Terminal Garage, were a group of trades or businesses under common control and thus deemed a single employer under ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1). Each of Lyons, Dupli-Color and Terminal Garage was making contributions to the Central States Pension Fund. Sherwin-Williams sold the stock of Lyons to J.R.C., an unrelated corporation, which group thereafter incurred financial problems and went bankrupt, ceasing contributions to the Central States Pension Fund. Dupli-Color continues to contribute to the Central States Pension Fund.

The question presented is —

Assuming, *arguendo,* that the exception to withdrawal liability provided by 29 U.S.C. § 1398 does *not* apply, is it possible for Sherwin-Williams to have incurred a *complete* withdrawal under 29 U.S.C. § 1383 from the Central States Pension Fund as a result of its sale of Lyons when there are ongoing contributions to the Central States Pension Fund by at least one other of its subsidiaries, Dupli-Color?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent, The Sherwin-Williams Company, states that it has no parent company and its subsidiaries (other than wholly-owned subsidiaries) are:

John's Color Wheel, Inc. (60% subsidiary)
Kaney Paints, Inc. (60% subsidiary)
Heritage Paint and Decorating, Inc. (60% subsidiary)
American Standox, Inc. (50% ownership)

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

RESPONDENT'S BRIEF IN OPPOSITION 1

JURISDICTION 1

STATUTES AND REGULATIONS 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. PETITIONER HAS MISSTATED AND EXAGGERATED THE ISSUE IN THIS CASE. 5

A. 29 U.S.C. § 1398(1) Is Not Applicable. .. 6

B. The Decision Below Neither Does Harm To Congressional Intent Nor Disrupts MPPAA's Statutory Scheme. 10

C. The Decision Below Does Not Conflict With PBGC Opinions. 17

D. The Decision Below Does Not Conflict With Decisions In Other Circuits. 20

II. PETITIONER'S POSITION CANNOT BE RECONCILED, AND IS IN CONFLICT WITH MPPAA'S EXPRESS STATUTORY LANGUAGE. 22

III. THE DECISION BELOW IS CORRECT. . . 25

CONCLUSION 29

APPENDIX

28 U.S.C. § 1254 . . . . . A3
29 U.S.C. § 1383(a) A4
29 U.S.C. § 1384(a) A5
29 U.S.C. § 1385(a) & (b) A8
29 U.S.C. § 1391(a), (b), (c) & (d) A11
29 U.S.C. § 1392(c) A27
PBGC Opinion Letter No. 93-3 (October 14, 1993) A28
Santa Fe Pacific Corp. v. Central States Pension Fund, 1992 U.S. Dist. LEXIS 15159 (N.D. Ill. 1992), *reversed* 22 F.3d 725 (7th Cir. 1994) A33

TABLE OF AUTHORITIES

CASES — Page

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 28

Borden v. Bakery & Confectionery Union & Indus. Int'l. Pension, 974 F.2d 528 (4th Cir. 1992) 14

Central States, Southeast and Southwest Areas Health and Welfare Fund v. Cullum Companies, Inc., 973 F.2d 1333 (7th Cir. 1992) 15

Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993) 25

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986) 14

Dorn's Transportation v. Teamsters Pension Trust Fund, 787 F.2d 897 (3d Cir. 1986) .. 21

Penn Central Corp. v. Western Conference of Teamsters Pension Trust Fund, 75 F.3d 529 (9th Cir. 1996) 21

Santa Fe Pacific Corp. v. Central States Pension Fund, 1992 U.S. Dist. LEXIS 15159 (N.D. Ill. 1992), *rev'd*, 22 F.3d 725 (7th Cir.), *and cert. denied*, 130 L. Ed. 2d 396 (1994) 13, 19

Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc., 698 F. Supp. 698 (W.D. Mich. 1987), *aff'd*, 857 F.2d 1107 (6th Cir. 1988) 15, 21

Textile Workers Pension v. Standard Dye & Finishing, 725 F.2d 843 (2d Cir.), *cert. denied*, 467 U.S. 1259 (1984) 14

STATUTES AND REGULATIONS

26 U.S.C. § 414(c) 28
28 U.S.C. § 1254(1) 1
29 U.S.C. § 1002(37) 2
29 U.S.C. § 1301(b)(1) 28
29 U.S.C. § 1383 ..... 3,4, 13, 14
29 U.S.C. § 1383(a) 1
29 U.S.C. § 1384 ..... 14, 16
29 U.S.C. § 1384(a) 1
29 U.S.C. § 1385 ..... 10, 12
29 U.S.C. § 1385(a)(1) 4, 18
29 U.S.C. § 1385(a) & (b) 1
29 U.S.C. § 1385(a)(1) & (b)(1) 7
29 U.S.C. § 1385(b)(2)(A)(i) & (ii) 7
29 U.S.C. § 1391 23
29 U.S.C. § 1391(a), (b), (c) & (d) 1
29 U.S.C. § 1392(c) 1, 16

29 U.S.C. § 1398 .... 11, 12, 14-16, 18, 19, 21, 24, 28
29 U.S.C. § 1398(1) 5-11, 13, 16, 17, 21
29 U.S.C. § 1398(2) 24
29 U.S.C. § 1399(b)(2) 3
29 U.S.C. § 1401(a) 3
29 U.S.C. §§ 1381-1405. 2
26 C.F.R. § 1.1563-1 28

OTHER AUTHORITIES

PBGC Op. Ltr. 92-1 ..... 17, 19
PBGC Opinion Letter No. 93-3 15
The Odyssey, Book XII, Homer 27, 28

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, The Sherwin-Williams Company, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 71 F.3d 1338 (7th Cir. 1995).

JURISDICTION

Central States has invoked the jurisdiction of this Court "under 28 U.S.C. § 1251(1)." However, 28 U.S.C. § 1251 deals with "original jurisdiction" and any reliance thereon by Central States is misplaced. However, based upon the nature of its petition, it, more appropriately, appears that Central States intended to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) by writ of certiorari.

STATUTES AND REGULATIONS

In addition to 29 U.S.C. § 1301 and 29 U.S.C. § 1398(1) set forth in the Petition, respondent sets out the following relevant statutes and regulations in the Appendix:

28 U.S.C. § 1254(1)
29 U.S.C. § 1383(a)
29 U.S.C. § 1384(a)
29 U.S.C. § 1385(a) & (b)
29 U.S.C. § 1391(a), (b), (c) & (d)
29 U.S.C. § 1392(c)

STATEMENT OF THE CASE

[The Statement of the Case in Central States' Petition is not complete and in certain respects is not accurate. Accordingly, Sherwin-Williams sets forth this statement of the case.]

The Sherwin-Williams Company ("Sherwin-Williams") is an Ohio corporation with its principal place of business located in Cleveland, Ohio. Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer plan as defined in 29 U.S.C. § 1002(37), with its principal offices located in Illinois.

This case arises under the withdrawal liability provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§1381-1405.

From 1987 until 1990, Sherwin-Williams owned *three* companies (Lyons Transportation Lines, Inc., Terminal Garage and Dupli-Color Products Co.) that contributed to Central States. On or about June 1, 1990, Sherwin-Williams sold the stock of Lyons Transportation Lines, Inc. ("Lyons") to JRC Acquisition Corp. ("JRC") for bona fide business reasons. After the sale, Lyons began to encounter numerous problems, which ultimately resulted in its demise. On October 12, 1990, Lyons ceased making contributions to Central States; and on October 19, 1990, Lyons and JRC filed Chapter 11 bankruptcy proceedings.

Pension contributions for the two covered employees at the Terminal Garage were made for most of 1990. However, by correspondence dated November 27, 1990, almost six months after Sherwin-Williams' sale of Lyons, subsequent to Lyons' Chapter 11 filing and cessation of contributions, counsel for the local union representing employees of Terminal Garage notified the National Labor Relations Board that it was disclaiming interest in serving as the collective-bargaining representative of the two union drivers employed by Terminal Garage. There-

after, Terminal Garage ceased making contributions to Central States. The other company, Dupli-Color, is still owned by Sherwin-Williams and still contributes to Central States.

By correspondence dated January 16, 1991, Central States assessed Sherwin-Williams for a complete withdrawal of Lyons under 29 U.S.C. § 1383. Central States also informed Sherwin-Williams that the demand applied to all members of any commonly controlled group of trades or businesses which included Lyons. Thus, despite the fact that Dupli-Color continued to contribute to Central States, Sherwin-Williams paid a total of $1,988,989.62 to Central States pursuant to its assessment.

By letter dated March 1, 1991, and pursuant to 29 U.S.C. §1399(b)(2), Sherwin-Williams requested Central States to review the assessment, in part because a complete withdrawal could not have occurred while other members of the Sherwin-Williams controlled group continued to contribute to Central States. Central States did not timely respond to Sherwin-Williams, and on August 27, 1991, Sherwin-Williams exercised its option under 29 U.S.C. §1401(a) to request arbitration of the assessment. Five months later, Central States informed Sherwin-Williams that the request for review was denied. By letter dated April 21, 1993 to Sherwin-Williams, Central States assessed Sherwin-Williams additional withdrawal liability in the amount of $1,327,077.44 attributable to a 1990 partial withdrawal due to cessation of Terminal Garage's contributions, which computation included the contribution history of Lyons and in this regard was duplicative of the first assessment.

By letter dated April 20, 1995, Central States assessed Sherwin-Williams additional withdrawal liability in the amount of $336,374.61 due to a 70% contribution decline pursuant to 29 U.S.C. §1385(a)(1). This assessment again took into consideration the contribution history of Lyons and provided a partial credit relating to Central State's second assessment.

On September 12, 1994, the arbitrator held that under no circumstances could Sherwin-Williams be liable for a complete withdrawal of Lyons since other members of the Sherwin-Williams' controlled group continued to contribute to Central States.

Central States, however, did not accept the arbitrator's decision which required Central States to return to Sherwin-Williams the nearly $2 million assessment which it had collected. On October 7, 1994, Central States filed a complaint to modify or vacate the arbitrator's award. On the same date, Sherwin-Williams filed a complaint to enforce the arbitrator's decision to return the assessment monies to Sherwin-Williams.

On March 15, 1995, the United States District Court for the Northern District of Illinois held that Sherwin-Williams was not liable for a complete withdrawal of Lyons, stating as follows:

> What controls here, however, is that in terms of the controlling statutory provisions it is [Central States] that is wrong. There is no complete withdrawal under Section 1383(a) unless the statutory 'employer' permanently ceases to have any contribution obligation . . . And because that did not occur as to the entire Sherwin-Williams conglomeration that constituted the statutory 'employer'

> under Section 1301(b)(1), and because Dupli-Color has always been part of that conglomeration and contributes to [Central States], no statutory 'complete withdrawal' can be found here.

[Petitioner's Appendix B, pp. 25a-26a.]

Once again, Central States refused to accept a decision which required it to return the assessment monies, and it appealed the district court's decision to the Seventh Circuit. The Seventh Circuit affirmed the decision of the district court as to the merits, stating as follows:

> There was, and is, only one 'group': the Sherwin-Williams group. No 'old Sherwin-Williams group.' Just one group comprising changing assortments and operations. That group has not completely withdrawn from [Central States].

[Petitioner's Appendix A, p. 10a.]

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS MISSTATED AND EXAGGERATED THE ISSUE IN THIS CASE.

When put in the proper focus, the question presented in this case is neither so expansive nor so dramatic as Central States suggests. Central States is arguing that this case — three times decided in Sherwin-Williams' favor — merits review by this Court on the basis of dicta in the Seventh Circuit's opinion. That dicta relates to the application of 29 U.S.C. § 1398(1), which provides an exemption to potential withdrawal liability under MPPAA. However, the arbitrator, both courts below and both parties have acknowledged, for purposes of what is the

single issue of this case, that the exemption of § 1398(1) is assumed to be inapplicable.

Central States is attempting to bootstrap what is a non-issue in this case — namely, whether 29 U.S.C. § 1398(1) applies to exempt from withdrawal liability the sale of a subsidiary where the requirements of § 1398(1) *are* satisfied — to suggest that the decision below is in conflict with both Pension Benefit Guaranty Corporation (PBGC) interpretations and decisions in other circuits. In fact, Sherwin-Williams has not only acknowledged the application of § 1398(l) to such sale of a subsidiary, but has and does take the position, albeit not otherwise relevant to these proceedings, that it is indeed entitled to the protection of that very exemption to prevent the imposition of even a partial withdrawal upon it in connection with its sale of stock in Lyons. This is clearly reflected in the arbitrator's decision. *See* Petitioner's Appendix C, at p. 36a.

A. 29 U.S.C. § 1398(1) Is Not Applicable.

During the arbitration proceedings, and at each subsequent level of review through which this case has progressed, it was clear that for purposes of deciding if indeed Sherwin-Williams could have incurred a *complete* withdrawal in light of ongoing contributions to Central States by Dupli-Color, it would be assumed, *arguendo,* that the exemption afforded by 29 U.S.C. § 1398(1) was *not* available. In other words, since it was suggested that whether or not Sherwin-Williams' sale of Lyons caused an interruption in employer contributions was dependent upon disputed facts and inferences to be reasonably drawn therefrom, it could not be determined without an evidentiary hearing whether Sherwin-Williams could rely on the

exemption afforded by § 1398(1). Thus, for purposes of merely focusing on the validity of the nature of Central States' assessment against Sherwin-Williams as a "complete" withdrawal, it was assumed that § 1398(1) was not available to Sherwin-Williams.[1]

That § 1398(1) was assumed to be inapplicable by the arbitrator is clearly set forth in his decision:

> Thus, the only question which remains for purposes of the instant 'Motion to Dismiss or, in the Alternative, Motion for Summary Judgment' is whether the facts, construed most favorably to [Central States] could be viewed as giving rise to a complete withdrawal, rather than a partial withdrawal. . . . for purposes of that Motion, we must assume *arguendo* that [Sherwin-Williams] remained responsible for Lyons, notwithstanding the sale of stock, either because the sale of stock caused the subsequent interruption in employer contributions to [Central States], so that it would be non-qualifying under 29

---

[1] In its 1991 Request for Review by which Sherwin-William.. first raised with Central States the issue as to the propriety of the complete withdrawal liability assessment against it, Sherwin-Williams pointed out to Central States that, in light of the ongoing contributions by Dupli-Color, even if 29 U.S.C. § 1398(1) were not available to protect Sherwin-Williams, at best Sherwin-Williams would have incurred a partial withdrawal. Further, since neither of the immediate types of partial withdrawal set forth in 29 U.S.C. § 1385(b)(2)(A)(i) & (ii) (so-called "bargaining agreement cessation" and "facility cessation," respectively) applied with respect to Lyons, Sherwin-Williams advised Central States that, again at best, the withdrawal might be a "70 percent contribution decline" partial withdrawal under 29 U.S.C. § 1385(a)(1) & (b)(1) which could not be calculated until after December 31, 1993.

> U.S.C. § 1398(1); or because it was intended to 'evade or avoid' withdrawal liability under 29 U.S.C. § 1392(c).
>
> * * * * *
>
> . . . We must assume for purposes of the instant Motion . . . that [Sherwin-Williams] would remain responsible for Lyons' cessation of operations and/or contributions, notwithstanding the sale of stock.
>
> Thus, the one issue which remains for purposes of this Motion is whether, under any state or assumed facts, the May 31, 1990 sale of stock and/or Lyons' subsequent cessation of operations and/or contributions could have given rise to a complete withdrawal (as [Central States] argues); or whether it could only have given rise to a partial withdrawal (as [Sherwin-Williams] argues).

[Petitioner's Appendix C, pp. 35a-37a]

Likewise, the district court did not apply § 1398(1) in reaching its determination:

> Given the limited scope of the current issues, however, this opinion will join the arbitrator in his view that neither [Section 1398 nor Section 1392(c)] is directly applicable to the transactions at issue . . .
>
> * * * * *
>
> . . . Section 1398 just does not describe the transactions that have given rise to this litigation.

[Petitioner's Appendix B, pp. 21a-22a & 25a]

Similarly, as conceded by Central States in its Petition at footnote 1, the Seventh Circuit assumed that the sale of Lyons caused an interruption in contributions to Central States thereby rendering § 1398(1) inapplicable. However, in addition to the assumed reason for finding § 1398(1) to be inapplicable to the instant case, the Seventh Circuit went on to question the circumstances under which § 1398(1) was intended to have application, bolstering its interpretation that an employer does not disappear merely by reason of the sale of a subsidiary where it continues making contributions to the pension fund directly or through yet another of its subsidiaries.

> We must assume that the sale of stock caused the collapse. The question remains whether the sale of a subsidiary terminates the existing corporate group and causes a new, shrunken group to spring into existence.

[Petitioner's Appendix A, p. 6a]

> What then is one to make of § 1398? As we read it, § 1398 is a savings clause, a proviso that comes into play only if some other step causes the participant to vanish. . . . Without some rule allowing the substitution of its successor, a transaction that has no economic effect on the pension fund would generate a windfall of withdrawal liability; . . .

[Petitioner's Appendix A, p. 9a]

As demonstrated by the foregoing discussion, Central States is clearly wrong in arguing that the decision below hinges on the question of whether 29 U.S.C. § 1398(1) applies to the sale of a subsidiary where there is no interruption in contributions, since all three decisions

below assumed that the sale of Lyons did cause an interruption in contributions such that the § 1398(1) exemption was *not* available to Sherwin-Williams.

B. The Decision Below Neither Does Harm To Congressional Intent Nor Disrupts MPPAA's Statutory Scheme.

Central States is attempting to argue that without qualifying for the protection of 29 U.S.C. § 1398(1), an employer selling the stock of even a single, small contributing subsidiary (even one small subsidiary out of 100, as dramatically pointed out by the Seventh Circuit) must experience a *complete* withdrawal on its theory that such employer ceases to exist. Further, suggests Central States, to find otherwise where the sold subsidiary subsequently goes bankrupt means that pension funds like Central States will bear the loss. This is precisely what Central States says in its Petition, at p. 9, in critiquing the decision below:

> . . . In the Seventh Circuit's view, however, the Sherwin-Williams control group is still the Sherwin-Williams control group even after the sale of Lyons. . . . Since contributions continue from another control group member (Dupli-Color), the Sherwin-Williams "employer" has not completely withdrawn and Sherwin-Williams is not liable . . . . Although Lyons ceased contributing (and withdrew), it cannot pay its withdrawal liability because it is bankrupt. According to the Seventh Circuit the pension plan (Central States) must bear the loss.

But in its attempt to garner sympathy to its cause, Central States conveniently neglects to mention the very real possibility that the surviving employer (*e.g.*, Sherwin-

Williams) could experience a partial withdrawal under 29 U.S.C. § 1385. As a matter of fact, so conspicuous by its absence is any meaningful discussion of the possibility of a partial withdrawal[2] when discussing the consequences of the decisions below, that whether intentionally or otherwise, Central States' Statement of the Case and depiction of the decisions below represent a troublesome distortion of the true state of affairs.

Specifically, in its Statement of the Case and Reasons for Granting the Writ, Central States misstated the rulings of the arbitrator and the Seventh Circuit. In its Petition at p. 4, Central States states that:

> The arbitrator ruled that if the sale of Lyons caused the interruption of contributions to Central States, then under § 1398 the Sherwin-Williams group should be deemed intact (as if Lyons had not been sold). But since Dupli-Color still contributed, a withdrawal could not have occurred and the Central States' assessment was erroneous.

This synopsis is inaccurate and misleading in several respects. First, the arbitrator did not rule "under § 1398." As discussed above, based upon the assumption that "[Sherwin-Williams] remained responsible for Lyons, notwithstanding the stock sale" the arbitrator expressly said that he regarded the transaction as "non-qualifying under 29 U.S.C. § 1398(1)." *See* Petitioner's Appendix C, p. 35a. Non-qualifying under § 1398 means that the conditions to come within the exemption of § 1398 were

---

[2] A passing reference to the 70 percent contribution decline partial withdrawal is mentioned in footnote 4 of the Petition as part of a generic discussion of the term "control group."

not satisfied. Thus, rather than applying § 1398 as Central States' summary would suggest, the arbitrator did not apply § 1398. Secondly, the arbitrator did not find that "a withdrawal could not have occurred" based upon Dupli-Color's ongoing contributions, but only that no "complete" withdrawal could have occurred, which was the single question in issue. The arbitrator specifically recognized the possibility that the cessation of Lyons' operations/contributions could give rise to a partial withdrawal (*see* Petitioner's Appendix C, p. 42a). Again, as reflected in footnote 1 to the arbitrator's decision, not only was a 70 percent contribution decline partial withdrawal possible, but Central States has in fact made an additional assessment against Sherwin-Williams on this basis.

Further, contrary to Central States' hysterical protestations that the court below "has attacked ERISA at its foundation" (Petition, p. 6) and "imperiled the concept of continuing responsibility for pension contribution history" (Petition, p. 10) and that its opinion "completely ignores [the] 'successorship' provision of § 1398" (Petition, p. 9) and "disregards [the] statutory mechanism for ensuring the continued responsibility for pension contribution history" (Petition, p. 10), none of these charges has validity. For some inexplicable reason, Central States has been clinging desperately, and unsuccessfully, to the notion that in connection with the type of transaction presented by the facts in the instant case, it must be an all or nothing proposition. Central States says that anything short of an immediate and complete withdrawal does damage to MPPAA and sticks pension funds with the burden. But by so doing, Central States is weighing a complete withdrawal against no withdrawal when in fact a partial

withdrawal is also possible and specifically recognized by MPPAA. *See* 29 U.S.C. § 1385.

Contrary to Central States' depictions, the Seventh Circuit did not say that Sherwin-Williams did not withdraw or that Sherwin-Williams could not be liable. Rather, it and the other decisions below say that one must look to the original employer to ascertain the nature of the possible withdrawal and, if the employer is still contributing, it cannot be a complete withdrawal. Even if the requirements for an immediate partial withdrawal are not satisfied, there is still the possibility of a 70% decline partial withdrawal. Of course, this would impact the timing and manner of calculation of the assessment. However, not only is this specifically contemplated and articulated by MPPAA, but Central States has conceded that it has taken this very same position in *Santa Fe Pacific Corp. v. Central States Pension Fund,* 1992 U.S. Dist. LEXIS 15159 (N.D. Ill. 1992), *rev'd* 22 F.3d 725 (7th Cir.), *and cert. denied,* 130 L. Ed. 2d 396 (1994) (*see* District Court's decision, Petitioner's Appendix B, p. 27a).

The result reached by the Seventh Circuit is entirely consistent with MPPAA's statutory scheme. Since it assumed that 29 U.S.C.§ 1398(1) did not apply, the withdrawal event occurred, as Central States has insisted, at the time of Sherwin-Williams' sale of Lyons. However, at that moment the Sherwin-Williams' control group (which included Dupli-Color and Terminal Garage) continued contributing to Central States. Thus, at that moment, the Sherwin-Williams control group neither ceased to have an obligation to contribute to Central States nor ceased all covered operations, which are the measures for determining a complete withdrawal under 29

U.S.C. § 1383. Hence, as of that moment, the requirements for a complete withdrawal were not met.

What Central States overlooks is that the successorship provision of § 1398 only sets out a blueprint to tracking post-transaction entities that will bear responsibility for pre-transaction contribution history when the exemption it provides is applicable. But here § 1398 was assumed to be inapplicable.

As this Court has observed in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225-226 (1986):

> The assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions. Moreover, there are a significant number of provisions in the Act that moderate and mitigate the economic impact of an individual employer's liability.

Contrary to Central States' assertions, it is not the decision of the court below but the position of Central States that does harm to the Congressional intent underlying MPPAA. This is dramatically demonstrated by a brief review of how that Congressional intent is reflected in certain of MPPAA's provisions.

The Fourth Circuit observed in *Borden v. Bakery & Confectionery Union & Industry Int'l. Pension*, 974 F.2d 528, 533-534 (4th Cir. 1992), when discussing the sale of assets exemption, provided by 29 U.S.C. § 1384, as but one of a number of provisions in MPPAA designed to limit the impact and application of withdrawal liability, that such exemption furthers "the purpose of the MPPAA to promote plan continuation and growth by encouraging

an employer to sell its operations to another employer that will continue to fund the plan, rather than to withdraw." To like effect, *see Textile Workers Pension v. Standard Dye & Finishing*, 725 F.2d 843, 853 (2d Cir.), *cert. denied*, 467 U.S. 1259 (1984) and *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Cullum Companies, Inc.*, 973 F.2d 1333, 1339 (7th Cir. 1992). § 1398 is another exception which encourages an employer to sell a subsidiary operation as an ongoing business rather than shut it down and trigger a withdrawal. *See Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698, 703 (W.D. Mich. 1987), *aff'd*, 857 F.2d 1107 (6th Cir. 1988).

Likewise, the PBGC, in PBGC Opinion Letter No. 93-3 (October 14, 1993) [Respondent's Appendix p. A28, A30] has indicated that MPPAA was not intended to maximize the withdrawal liability of an employer:

> . . . Section 4225 is but one of several ERISA provisions that limit the amount of withdrawal liability imposed upon withdrawing employers [citing also ERISA §§ 4203(b), (c), (d), and (f), 4204, 4207, 4208, 4209, 4210, 4217, 4218, 4219(c)(1)(B), 4224 and 4225]. Nothing in the Congressional findings and policy declarations that preface MPPAA indicate that the withdrawal liability limitation provisions should be construed to maximize the liability of an employer.. . . The same is true of the legislative history.

Yet by Central States' interpretation of MPPAA, it would impose the more drastic consequence of a complete withdrawal upon Sherwin-Williams for selling the stock of

Lyons than if Sherwin-Williams had shut Lyons down and been potentially subject to a partial withdrawal. Possibly even more incredible under Central States' interpretation is the result that Sherwin-Williams would be more severely impacted, through the imposition of complete withdrawal liability, for selling the stock of Lyons for the good motives articulated above of promoting ongoing business that will perpetuate contributions to multiemployer plans and promote their financial integrity, than if Sherwin-Williams had as a principal purpose for such transaction the evasion or avoidance of MPPAA withdrawal liability. If Sherwin-Williams had this latter "evil" intent, then 29 U.S.C. § 1392(c) would operate to disregard the transaction, thereby again subjecting Sherwin-Williams to a potential partial withdrawal. In other words, if Central States is to be believed, then Congress intended to impose upon an employer, whose motive for engaging in a transaction was to intentionally evade withdrawal liability, a less severe financial consequence than an employer who merely sells an entity in a transaction which is not exempt under § 1398 with no such motive. But clearly, such was not the intent of Congress in enacting MPPAA.[3]

---

[3] The decision below finds further support in 29 U.S.C. § 1384, which provides another exemption from withdrawal liability in the context of an employer's sale of assets. If this sale of assets exemption does not apply, the *seller* in such transaction has exposure for either a complete or partial withdrawal. If an employer's sale of stock of a subsidiary does not satisfy the exemption of § 1398(1), why would the seller in such transaction not have the same exposure for either a complete or partial withdrawal?

C. The Decision Below Does Not Conflict With PBGC Opinions.

The answer given by the Seventh Circuit to the question presented in the instant case was not inconsistent with any pronouncements issued by the PBGC. None of the PBGC opinion letters contained in Petitioner's Appendix D concern the specific question here at issue. Although PBGC Opinion Letter No. 92-1 (March 30, 1992) [Petitioner's Appendix D, p.59a] concerns the application of § 1398(1) in connection with the sale of a subsidiary, the hypothetical facts upon which it focuses stop short of the situation present in the instant case. Thus, the PBGC has never indicated whether an employer that sells the stock of a subsidiary in a non-qualifying transaction experiences a complete withdrawal even if another subsidiary of the employer continues to contribute to the pension fund.

If anything, it would appear that PBGC Opinion Letter No. 92-1 supports the conclusions (but, concededly, not the analysis[4]) of the Seventh Circuit. The discussion contained in PBGC Opinion Letter No. 92-1 which relates to the sale of the stock of subsidiary C to an unrelated purchaser that continues to make contributions to the plan is most relevant in this regard:

> In your hypothetical, the sale of C's stock causes no interruption in contributions or obligations to the

---

[4] Although the Seventh Circuit seemed to question certain of the PBGC's analysis of § 1398, the district court, in reaching the same conclusion as the Seventh Circuit, expressly referenced PBGC Opinion Letter No. 92-1 and acknowledged that the PBGC opinions are entitled to deference. *See* Petitioner's Appendix B, p. 23a, footnote 14.

> plan. C and its new controlled group, if any, and the P controlled group, continue to contribute to the Plan. Consequently, there is no complete withdrawal by the P controlled group, or by C and its new controlled group, if any.

[Petitioner's Appendix D, p. 63a]

Here, the PBGC found that no complete withdrawal had been experienced by the original employer, the P controlled group. Whether the PBGC's conclusion hinges on the application of § 1398 or because the P controlled group continues to contribute to the plan through subsidiary D is not articulated.

Perhaps more instructive is the PBGC's discussion that follows concerning the effect of the sale of C's stock on determining whether a partial withdrawal occurs under § 1385(a)(1).

> . . . Under [§ 1398], P's controlled group would not ordinarily incur a partial withdrawal in the third plan year following the sale of C's stock. However, in order to avoid partial withdrawal liability, the decline in contributions must be 'solely' because of a covered change in corporate structure. 29 U.S.C. § 1398.
>
> * * * * *
>
> If the decline in contributions is determined to be solely because of the sale of C's stock, the contribution history transferred in the [§ 1398] transaction is excluded from the base year calculations used to determine whether a 70% decline has occurred under [§ 1385(b)(1)(B)(ii)]. If the decline in contributions is determined not to be solely because of

> the sale of C's stock, C's contribution history is included in the base year calculation.

[Petitioner's Appendix D, pp. 64a-65a]

It is the last sentence above quoted from the PBGC discussion which supports the decisions of the Seventh Circuit, the district court and the arbitrator and which contradicts the position of Central States. This sentence indicates that in the case of a nonqualifying transaction, C's contribution history is included in the base year calculations for determining a partial withdrawal of P's controlled group. None of this discussion would be relevant if Central States were correct in its argument that a nonqualifying transaction triggers an immediate complete withdrawal by P's controlled group.

The court in *Santa Fe Pacific Corporation v. Central States, Southeast and Southwest Areas Pension Fund,* 1992 U.S. Dist. LEXIS 15159 (N.D.Ill. 1992), *rev'd on other grounds* 22 F.3d 725 (7th Cir.), *and cert. denied,* 130 L. Ed. 2d 396 (1994), has construed PBGC Opinion Letter No. 92-1 as providing that a partial withdrawal may occur as the result of a change in corporate structure that fails to satisfy § 1398. The court specifically acknowledges the PBGC's position that a sale of stock may result in a partial withdrawal if the sale does not qualify as a change in corporate structure under § 1398. Moreover, both the arbitrator and the district court noted that in the *Santa Fe* case, Central States had itself acknowledged the possibility of such partial withdrawal. *See* Petitioner's Appendix C, p. 42a and Appendix B, p. 27a. Thus it is clear that the decision below, to the effect that a stock sale which does not satisfy § 1398 may result in a partial withdrawal if

other members of the controlled group contribute to the plan, is not in conflict with the PBGC's interpretations of MPPAA.

D. The Decision Below Does Not Conflict With Decisions In Other Circuits.

As discussed above, Central States is attempting to bootstrap what is a nonissue in this case to suggest a conflict in the circuits. However, the question presented in this case was recognized by both the district court [*see* Petitioner's Appendix B, p. 27a] and the Seventh Circuit [*see* Petitioner's Appendix A, p. 11a] as a case of first impression. In connection with Central States' appeal of this case to the Seventh Circuit, Central States, in its "Reply Brief of Appellant Central States in Its Appeal (No. 95-1952) and Response Brief of Appellee Central States to Sherwin-Williams' Appeal (No. 95-2028)" at p. 18, has specifically referred to the fact that this case presents a question of first impression as a basis militating against Sherwin-Williams' claim for attorneys' fees:

> Judge Shadur concluded that this case 'presents a question of first impression,' and that neither party 'had been able to adduce authority on the special circumstances posed in this case.' . . . The presence of novel legal issues is an important consideration which, in most cases, militates against the award of attorney fees. *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1409-10 (7th Cir. 1992).

Accordingly, it is impossible for the decision of the Seventh Circuit to be in conflict with the decisions of other circuits.

Each of the cases cited by Central States, in support of its assertion that a conflict exists, posed a different issue

than is present in the instant case. Both *Teamsters Pension Trust Fund v. Central Michigan Trucking*, 857 F.2d 1107 (6th Cir. 1988) and *Dorn's Transportation v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986), involved sale of stock transactions where the § 1398 exemption was found to be applicable. *Penn Central Corp. v. Western Conference of Teamsters Pension Trust Fund*, 75 F.3d 529 (9th Cir. 1996), involved a sale of stock transaction where § 1398(1) was found not to be applicable to prevent a complete withdrawal; however, after the sale, neither Penn Central nor any of its subsidiaries was making ongoing contributions to the fund.

Again, since 29 U.S.C. § 1398(1) was expressly assumed to be inapplicable to this case, it is not determinative to the question presented in this case as to what transactions are deemed to come within the purview of § 1398(1)'s exemption. Furthermore, even if it would be considered relevant in answering the question here at issue, the decisions to which Central States refers have not expressly reached contrary conclusions. Rather, Central States contends in its Petition, at p. 19:

> . . . This places the Seventh Circuit in conflict with the Third, Sixth, and Ninth Circuits, each of which has held that § 1398 does apply to stock sales *and necessarily held (by implication)* that if the requirements of § 1398 are not met, then the sale of stock constitutes a withdrawal due to the dissolution of the control group. [Emphasis added]

In other words, Central States is extrapolating from the decisions which the Third, Sixth and Ninth Circuits rendered on a different, albeit related, issue and putting words into the mouths of these courts to say what these

courts would, in Central States' estimation, "necessarily [hold] (by implication)" on the different issue presented in this case in order to create a conflict where none exists.

II. PETITIONER'S POSITION CANNOT BE RECONCILED, AND IS IN CONFLICT WITH MPPAA'S EXPRESS STATUTORY LANGUAGE.

The interpretation of MPPAA's withdrawal liability provisions advocated by Central States in the proceedings below is fraught with problems. In arguing that the Sherwin-Williams control group ceased to exist upon the non-qualifying sale of Lyons notwithstanding the ongoing contributions of Dupli-Color, Central States has had to develop an entirely new, hybrid theory of a "partial complete withdrawal" that finds no basis in MPPAA. Central States has consistently maintained this position as most recently articulated by it to the Seventh Circuit:

> In this case, [Central States] assessed all members of the pre-stock sale controlled group (including Lyons, Sherwin-Williams and its non-Lyons subsidiaries) with a *complete* withdrawal. This complete withdrawal resulted from Sherwin-Williams' non-exempt sale of the stock of Lyons. But because the loss of the exemption was only caused by the 'interruption in employer [pension] contributions' *from Lyons* . . . [Central States] only used the pre-stock sale contribution history of Lyons as the mathematical basis for the assessment.. . . It is true that this differs from the way in which a *complete* withdrawal is ordinarily calculated. However, [Central States] used this method because it appeared that the pre-stock sale controlled group only lost the [§ 1398] exemption *to the extent of* the interruption in contri-

> butions from Lyons that resulted from the stock sale. That is, the stock sale only caused an interruption in pension contributions from Lyons, and so [Central States] only used the contribution history of Lyons to calculate this withdrawal.
>
> Therefore, the stock sale was not a 'partial/complete' withdrawal, but a complete withdrawal, subject to a partial exemption.

[Reply Brief of Appellant Central States in its Appeal (No. 95-1952) and Response Brief of Appellee Central States in Sherwin-Williams' Appeal (No. 95-2028), at pp. 13-14]

As reflected in Central States' own explanation, it has created a new "partial exemption," while acknowledging that "[i]t is true that this differs from the way in which a *complete* withdrawal is ordinarily calculated." Nowhere in MPPAA's comprehensive scheme is this notion found. Central States developed this notion because it realizes that the position it is advocating to impose a complete withdrawal on Sherwin-Williams creates horrific consequences which are clearly inappropriate under and unintended by MPPAA. Following the plain language of MPPAA, Central States' assessment of complete withdrawal liability on Sherwin-Williams would have the ludicrous result of imposing liability on Sherwin-Williams even with respect to the contribution history of Dupli-Color, while ignoring the fact that it is making ongoing contributions to Central States. 29 U.S.C. § 1391 sets forth the various permissible methods for computing withdrawal liability. Nowhere within § 1391 is there any reference or acknowledgment of the possibility of the application of a partial exemption from complete withdrawal liability.

Rather the computation is to be based in part upon "all contributions required to be made by the employer." *See* Respondent's Appendix, pp. A11-A26. Central States has gone to great lengths in its Petition to define the term "employer"; however, for purposes of its theory, it would deviate from its own definition and exclude the contribution history of those members of the Sherwin-Williams control group that are making contributions. Yet, it has suggested to this Court that it is not Central States' position but that of the court below that would do harm to the traditional view of the term "employer." [*See* Petition, pp. 5-6]

Central States has found itself in this dilemma in part because of its insistence that a non-qualifying sale of a subsidiary must result in a "complete" withdrawal. It has so argued because it seeks to make an immediate assessment against the employer under circumstances where an immediate partial withdrawal is not available. It is impatient and unwilling to recognize the fact that MPPAA has already in place the 70 percent contribution decline partial withdrawal mechanism by which it and other multiemployer pension funds can look for recovery, provided the requirements are satisfied.

However, by insisting that a failure to come within the exemption of 29 U.S.C. § 1398 must result in a complete withdrawal and charging the court below with failing to recognize the "successorship" language of § 1398, Central States has conveniently ignored § 1398(2). § 1398(2) provides a second exemption from withdrawal liability where an employer suspends contributions under a plan during a labor dispute involving its employees. Certainly, Central States has not suggested that but for the application of § 1398(2), the suspension of contributions with

respect to a single, small facility during a labor dispute, when the employer is continuing to make significant contributions to the pension fund with respect to the substantial part of its operations, would result in complete withdrawal liability. But yet, this is where its argument must lead, unless it creates another nonstatutory partial exemption.

III. THE DECISION BELOW IS CORRECT.

This Court has recently found, in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 124 L. Ed. 2d 539, 567 (1993), MPPAA to be less than a completely clear and coherent statute. Here again, as in *Concrete Pipe*, Central States' argument would create an incoherent and ridiculous result. Cool heads must make sense out of the language. Cool heads have now done so three times, reaching the same conclusion.

As discussed above, Central States' argument leads to such a ludicrous result that it must create its own exception without any statutory basis to avoid imposing upon Sherwin-Williams withdrawal liability even with respect to Dupli-Color, its subsidiary that continues making contributions to Central States. Sherwin-Williams saw the flaw in Central States' approach, as did the arbitrator and the district court and as did the Seventh Circuit.

The Seventh Circuit, in reviewing and comparing the decisions of the arbitrator and the district court, observed that the "district judge . . . took a different route to the same conclusion" (Petitioner's Appendix A, p. 4a). The arbitrator saw that the argument put forth by Central States was flawed:

> There are fundamental problems with the Fund's argument. Its asymmetrical approach to the stock sale is neither logical, nor supported by any cited arbitral or judicial precedents. . . . In effect, the Fund wishes the arbitrator to recognize the consequences which work to its advantage (the continuing financial liability of [Sherwin-Williams]), while disregarding those which work to its disadvantage (the continuation of the pre-sale [Sherwin-Williams] controlled group).

[Petitioner's Appendix C, pp. 39a-40a]

The district judge agreed with the arbitrator's analysis of Central States' "bifurcated approach" (*see* Petitioner's Appendix B, p. 18a) and joined the arbitrator "in his view that neither [Section 1398 nor Section 1392(c)] is directly applicable to the transactions at issue . . . " (*see* Petitioner's Appendix B, p. 21a-22a), but used a different analysis to reach its same conclusion. The Seventh Circuit saw the problems presented by Central States' position in a somewhat different light:

> Neither the arbitrator nor the district court directly confronted [Central States'] central argument: that when Sherwin-Williams sold its stock in Lyons, the old Sherwin-Williams group vanished, as if it had fallen into one of Kurt Vonnegut's chrono-synclastic infundibulums.

[Petitioner's Appendix A, p. 5a]

Although the Seventh Circuit rejected Central States' position as flawed and embraced that of Sherwin-Williams as logical and consistent with MPPAA's objectives and general statutory scheme, it wrestled with the specific

statutory construction applicable. The arbitrator had observed in light of Dupli-Color's ongoing contributions to Central States that:

> . . . if there had never been a sale of the Lyons stock, the cessation of the Lyons operation and/or contributions in October, 1990 would only have led to a partial withdrawal; but it would not have led to a complete withdrawal of the [Sherwin-Williams] controlled group. It makes little sense for the result to be different simply because a non-qualifying sale of the Lyons stock occurred on or about May 31, 1990.

[Petitioner's Appendix C, p. 40a]

Likewise, the Seventh Circuit appreciated that the sale of a subsidiary's stock should have withdrawal liability consequences no more severe than if that subsidiary were not sold but its operations merely shut down. *See* Petitioner's Appendix A, pp. 7a-8a.

Yet Central States continued, and still continues, to sing its song of complete withdrawal liability and beckon those who will listen to adhere to its logic. However, that logical (really, illogical) conclusion would frustrate the Congressional intent behind MPPAA and allow Central States and other pension funds to reap a windfall.

Although the Seventh Circuit may have strayed somewhat off course in its analysis, its destination was clear. The decisions below do no harm to the Congressional intent behind MPPAA or to its statutory scheme. Central States, like the Sirens in *The Odyssey,* attempted to draw the Seventh Circuit to an illogical and destructive

conclusion.[5] But like Odysseus, the court below steered its interpretation of MPPAA clear of the arguments with which Central States attempted to lure it onto the rocks.

It is the well-established policy of this Court that it reviews judgments, not statements in opinions. As this Court observed in *Black v. Cutter Laboratories,* 351 U.S. 292 (1956) at 298:

> . . . At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests.

Thus, to the extent the Seventh Circuit may have strayed off course in its discussion of Treasury regulations under 26 C.F.R. § 1.1563-1, relating to controlled groups, for insight into the definition of "employer" under 29 U.S.C. § 1301(b)(1) and Section 414(c) of the Internal Revenue Code, this departure was not determinative of its decision. Rather, as discussed above, it was more by way of an intellectual exercise as to what might be included within the purview of the exemption to withdrawal liability provided by 29 U.S.C. § 1398, even though it was clear, for purposes of the instant case, that § 1398 was assumed to be inapplicable. Thus, the analysis put forth by the Seventh Circuit in this respect was tangential to, and not determinative of, its primary inquiry. Further, although the Seventh Circuit chose to wander down this path of

---

[5] "If any man draws near in his innocence and listens to [the Sirens'] voice, he never sees home again . . ." Homer's *The Odyssey,* Book XII.

inquiry, neither the decision of the arbitrator nor that of the district court contained such discussion in reaching a similar conclusion to that of the Seventh Circuit with respect to the real question presented.

CONCLUSION

For these reasons, Central States' petition for a writ of certiorari should be denied.

Respectfully submitted,

Ronald Leo Kahn *Counsel of Record*
Harold H. Reader III
Patricia A. Shlonsky
Gregory A. Gordillo
ULMER & BERNE P.L.L.
1300 E. Ninth Street, Ste. 900
Cleveland, Ohio 44114-1583
(216) 621-8400

Ron M. Tamburrino
THE SHERWIN-WILLIAMS COMPANY
101 Prospect Avenue
Cleveland, Ohio 44115
(216) 566-2360

Mitchell A. Orpett *of Counsel*
TRIBLER & ORPETT, P.C.
30 North LaSalle Street, Ste. 2200
Chicago, Illinois 60602
(312) 201-6400

Attorneys for Respondent

A1

APPENDIX

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 81--SUPREME COURT

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER III--PLAN TERMINATION INSURANCE
SUBTITLE E--SPECIAL PROVISIONS FOR MULTIEMPLOYER PLANS
PART 1--EMPLOYER WITHDRAWALS

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer--

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER III--PLAN TERMINATION INSURANCE
SUBTITLE E--SPECIAL PROVISIONS FOR MULTIEMPLOYER PLANS
PART 1--EMPLOYER WITHDRAWALS

§ 1384. Sale of assets

(a) Complete or partial withdrawal not occurring as a result of sale and subsequent cessation of covered operations or cessation of obligation to contribute to covered operations; continuation of liability of seller

(1) A complete or partial withdrawal of an employer (hereinafter in this section referred to as the "seller") under this section does not occur solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party (hereinafter in this section referred to as the "purchaser"), the seller ceases covered operations or ceases to have an obligation to contribute for such operations, if--

(A) the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan;

(B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year

beginning after the sale of assets, a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to the greater of--

(i) the average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale of the employer's assets occurs, or

(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs,

which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first 5 plan years beginning after the sale; and

(C) the contract for sale provides that, if the purchaser withdraws in a complete withdrawal, or a partial withdrawal with respect to operations, during such first 5 plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations (but for this section) if the liability of the purchaser with respect to the plan is not paid.

(2) If the purchaser--

(A) withdraws before the last day of the fifth plan year beginning after the sale, and

(B) fails to make any withdrawal liability payment when due,

then the seller shall pay to the plan an amount equal to the payment that would have been due from the seller but for this section.

(3)(A) If all, or substantially all, of the seller's assets are distributed, or if the seller is liquidated before the end of the 5 plan year period described in paragraph (1)(C), then the seller shall provide a bond or amount in escrow equal to the present value of the withdrawal liability the seller would have had but for this subsection.

(B) If only a portion of the seller's assets are distributed during such period, then a bond or escrow shall be required, in accordance with regulations prescribed by the corporation, in a manner consistent with subparagraph (A).

(4) The liability of the party furnishing a bond or escrow under this subsection shall be reduced, upon payment of the bond or escrow to the plan, by the amount thereof.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER III--PLAN TERMINATION INSURANCE

SUBTITLE E--SPECIAL PROVISIONS FOR MULTIEMPLOYER PLANS
PART 1--EMPLOYER WITHDRAWALS

§ 1385. Partial withdrawals

(a) Determinative factors

Except as otherwise provided in this section, there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year--

(1) there is a 70-percent contribution decline, or

(2) there is a partial cessation of the employer's contribution obligation.

(b) Criteria applicable

For purposes of subsection (a) of this section--

(1)(A) There is a 70-percent contribution decline for any plan year if during each plan year in the 3-year testing period the employer's contribution base units do not exceed 30 percent of the employer's contribution base units for the high base year.

(B) For purposes of subparagraph (A)--

(i) The term "3-year testing period" means the period consisting of the plan year and the immediately preceding 2 plan years.

(ii) The number of contribution base units for the high base year is the average number of such units for the 2 plan years for which the employer's contribution base units were the highest within the 5 plan years immediately preceding the beginning of the 3-year testing period.

(2)(A) There is a partial cessation of the employer's contribution obligation for the plan year if, during such year--

(i) the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location, or

(ii) an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased.

(B) For purposes of subparagraph (A), a cessation of obligations under a collective bargaining agreement shall not be considered to have occurred solely because, with

respect to the same plan, one agreement that requires contributions to the plan has been substituted for another agreement.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER III--PLAN TERMINATION INSURANCE
SUBTITLE E--SPECIAL PROVISIONS FOR MULTIEMPLOYER PLANS
PART 1--EMPLOYER WITHDRAWALS

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of--

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded

vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),[1]

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending--

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

---

[1]So in original. The comma should probably be a semicolon.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which--

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of--

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of--

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction--

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of--

(A) such unamortized amount; multiplied by--

(B) a fraction--

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers--

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of--

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.[2]

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405

---

[2]So in original. The period probably should be a comma.

of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of--

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an

employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be determined in a manner different from that provided in subsection (b) of this section.

(2)(A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of--

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction--

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of--

(i) an amount equal to--

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction--

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of--

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction--

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4)(A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of--

(i) the plan's unfunded vested benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets determined under

subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying--

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction--

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction--

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets determined under subparagraph (C) by a fraction--

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all preceding plan years; and

(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction--

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of

benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws, is equal to--

(i) an amount equal to--

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to--

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5)(A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this

section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) of this section shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of Title 26, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c) of this section.

(2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT
INCOME SECURITY PROGRAM
SUBCHAPTER III--PLAN
TERMINATION INSURANCE
SUBTITLE E--SPECIAL
PROVISIONS FOR MULTIEMPLOYER PLANS
PART 1--EMPLOYER WITHDRAWALS

§ 1392. Obligation to contribute

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

Pension Benefit Guaranty Corporation
Opinion Letter 93-3, October 14, 1993.

We write in response to your inquiry. You ask whether the PBGC adheres to the interpretation of section 4225 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), set forth in its *amicus curiae* brief in *Trustees of the Amalgamated Insurance Fund v. Geltman Industries*, 784 F.2d 926 (9th Cir. 1986). In its brief, PBGC addressed the proper application of ERISA §§ 4225(a) and 4225(b) where the withdrawn employer satisfies the prerequisites for the application of both subsections. PBGC expressed the view that an employer meeting the criteria in both subsections (a) and (b) may elect the limitation that yields the lesser of the amounts determined under the two subsections. The Ninth Circuit, however, reached a contrary conclusion. 784 F.2d at 929-30. For the reasons set out below, PBGC continues to believe that its interpretation of ERISA §§ 4225(a) and 4225(b) is correct as a matter of law.

Under ERISA § 4225(a)(1)(A), an employer who withdraws in connection with a "bona fide sale of substantially all of [its] assets in an arm's-length transaction to an unrelated party" will ordinarily be permitted to retain a portion of its dissolution value. The *Geltman* court, however, citing "the language and . . . structure" and the "underlying policies of ERISA and MPPAA," concluded that an "insolvent" employer must be denied relief under subsection (a)(1)(A), because subsection (b) provides a different liability limit that is

explicitly directed to "an insolvent employer undergoing liquidation or dissolution."

This analysis overlooks several pertinent points. First, when Congress intended to deny classes of employers relief under section 4225, it did so explicitly. *See* ERISA § 4211(d) (prohibiting application of section 4225 to employers who withdraw from coal-industry pension plans). Significantly, nothing in the language of section 4225 suggests that subsections (a) and (b) are mutually exclusive.[1] The two provisions have separate factual prerequisites, and provide different types of relief. So long as an employer satisfies the requirements of both subsections, it should qualify for relief under either rule, and its liability should not exceed the lesser of the amounts determined under the two subsections.

This conclusion is further supported by the technical definition of "insolvency" included in section 4225. Under section 4225(d)(1), "an employer is insolvent if [its] liabilities, including withdrawal liability under the plan (determined without regard to *subsection (b)*), exceed [its] assets (determined as of the commencement of the

---

[1]Sections 4225(a) and (b) both begin with the phrase "in the case of an employer." The *Geltman* court suggested this phrase was "evidence that the sections are to operate exclusive of each other . . . ." This suggestion is manifestly incorrect. The phrase "in the case of" is used as an introduction to at least 30 provisions of MPPAA; in each such instance, it is used in its normal statutory sense, as a synonym for "when" or "if". 20A Words and Phrases 75 (1959 & Supp. 1983).

liquidation or dissolution)" (emphasis added). Section 4201(b)(1)(D) defines "withdrawal liability" as including adjustment pursuant to section 4225. Thus, the use of the term "withdrawal liability" in the definition of insolvency incorporates any reduction in withdrawal liability resulting from the application of section 4225 (including subsection (a)) except the reduction set out in section 4225(b), which is specifically excluded.[2]

PBGC believes that its interpretation of section 4225 is fully consistent with the "underlying policies of ERISA and MPPAA." Section 4225 is but one of several ERISA provisions that limit the amount of withdrawal liability imposed upon withdrawing employers.[3] Nothing in the congressional findings and policy declarations that preface MPPAA indicate that the withdrawal liability limitation provisions should be construed to maximize the liability of an employer. *See* MPPAA § 3, codified at 29 U.S.C. § 1001a. The same is true of the legislative history.

---

[2]The decision is therefore incorrect when it states that whether "an employer is an insolvent employer . . . is done by looking to the provisions of [section 4225(d)(1)] without regard to [section 4225(a)]." *Geltman*, 784 F.2d at 929.

[3]*See, e.g.*, ERISA §§ 4203(b), (c), (d), and (f), 4204, 4207, 4208, 4209, 4210, 4217, 4218, 4219(c)(1)(B), 4224, and 4225. The Supreme Court has noted with approval Congress's efforts to moderate the impact of withdrawal liability on employers, including Congress's effort in section 4225. *Connally v. PBGC*, 475 U.S. 211, 225, 226 n.8 (1986).

Finally, the interpretation offered in *Geltman* makes little economic sense. Under the rationale of the decision, an employer whose liabilities exceeded its assets by only one dollar is "insolvent" and would automatically forfeit any relief under section 4225(a)(1)(A). In contrast, if the employer's assets were one dollar greater than liabilities, the full liability limitation would apply.[4] As discussed above, the application of the plain language of the statute avoids this sort of anomaly.

In conclusion, the plain wording of section 4225 dictates that an employer that meets the requirements of both subsections (a) and (b) is entitled to an assessment of withdrawal liability that does not exceed the lesser of the amounts determined under (a) and (b). Neither the legislative purpose nor principles of statutory construction compel a contrary conclusion. The PBGC therefore continues to adhere to the position stated in its brief *amicus curiae*.

---

[4]The attached table, drawn from the PBGC's *amicus* brief, illustrates the dramatic increase in employer liability caused by the single dollar difference.

I trust this responds to your question. If you have further questions regarding this matter, please contact Karen Morris of my staff at (202) 778-8822.

Sincerely,

Carol Connor Flowe
General Counsel

[Addendum referenced in footnote 4 deleted as not being germane to the subject matter for which PBGC Op. Ltr. 93-3 is being cited]

No. 92 C 0677

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

SANTA FE PACIFIC CORPORATION, Plaintiff,
v.
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND, Defendant.

October 6, 1992, Decided
October 7, 1992, Docketed

OPINION: Hon. Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

Defendant Central States, Southeast and Southwest Areas Pension Fund ("Central States") has moved under Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend our Memorandum Opinion and Order of August 20, 1992 (the "Opinion"). In that Opinion, we granted Central States' motion to vacate the arbitrator's award, and we remanded this case to the arbitrator for clarification of the standard he applied under *29 U.S.C. § 1392(c)*. We also denied Plaintiff Santa Fe Pacific Corporation's ("Santa Fe") motion to confirm the arbitrator's award.

Central States raises three issues in its current motion. First, it asserts that we misunderstood its argument that Santa Fe is liable for a partial withdrawal because of a seventy percent decline in contribution levels, and it asks us to remand this issue to the arbitrator.[1] Second, it requests clarification regarding our suggestion in the Opinion that the two-pronged "objective/subjective" test formulated by Judge Moran in *In re Int'l Harvester's Disp. of Wisconsin Steel Litig., 681 F. Supp. 512 (N.D. Ill. 1988)*, is an appropriate guideline for determining a violation of *29 U.S.C. § 1392(c)*. Third, it requests that we remand this case to a new arbitrator. We have already rejected the last request,[2] so we address only the first two issues in this Opinion. For the reasons set forth below, we grant Central States' motion in part and deny it in part.

Discussion

We note as a preliminary matter that Rule 59(e) is not available to Central States given the posture of this case. Rule 59(e) applies only to "final" judgments. *National R.R. Passenger Corp. v. New Castle County, 636 F. Supp. 1482, 1486 (D. Del. 1986)*. "'Judgment' as used in [the Federal Rules of Civil Procedure] includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Our decision, set forth in the Opinion, is not an

---

[1]Central States asked alternatively that we certify the seventy percent decline issue to the Court of Appeals. We denied this request in our Order of September 11, 1992.

[2]See Order of September 11, 1992.

appealable order, for the parties must move again in this Court to confirm or to vacate the arbitrator's award after the arbitrator issues his new Report.

As a result, if we are to consider the motion at all, we must treat it as a common law motion for reconsideration. Rodgers v. Sullivan, 1991 WL 274446, n.1 (N.D. Ill. Dec. 13, 1991); *Above the Belt v. Mel Bohannan Roofing, 99 F.R.D. 99, 101 (E.D. Va. 1983)*. Because we believe that consideration of the issues presented in the motion will clarify our views for the benefit of the arbitrator, we will consider them.

I. Partial Withdrawal Liability

Central States had argued in its motion to vacate the arbitrator's award that the arbitrator had failed to rule on the threshold question of whether Santa Fe had experienced a seventy percent decline in contribution levels from 1983 through 1985 so as to constitute a partial withdrawal under *29 U.S.C. § 1385* (1985). We rejected this argument at that time because we found that Central States was attempting to hold Santa Fe responsible for the withdrawal liability of SFTT alone, but that at the time of Santa Fe's sale of SFTT, which occurred midway through the three-year test period required by § 1385, SFTT may have ceased to be a member of the Santa Fe control group and may have become a member of the Rail Services, Inc., control group. We held:

Central States cannot attribute SFTT's contribution levels in the latter half of 1984 and in 1985 to Santa Fe at all unless Central States can avail itself of § 1392(c), so that the sale can be disregarded, or unless Central States

can show the sale of SFTT's stock was not a change in corporate structure within the meaning of § 1398.

Opinion at 7-8.

We noted in the Opinion that Central States had failed to provide us with a single citation to the arbitration record to demonstrate that the contribution levels of any entity purportedly in the Santa Fe control group, other than SFTT, were submitted in evidence to the arbitrator. Now Central States provides to us for the first time information apparently compiled from Central States Exhibit 177, one of well over one hundred exhibits (as best we recall) that were used during the arbitration. On the basis of the information taken from this exhibit, Central States now attempts to give us facts to demonstrate the existence of the seventy percent decline in the Santa Fe control group's contribution levels.

Central States may not remedy on a motion for reconsideration omissions it made earlier in these proceedings. See *United States ex rel. Lynch v. Sandahl, 793 F. Supp. 787, 795-96 (N.D. Ill. 1992)* ("[A] motion for reconsideration may not be employed as a vehicle to introduce new evidence that could have been produced prior to the entry of judgment.") Central States has had repeated opportunities to present this argument but has consistently failed to do so in a coherent manner. Before the arbitrator, Central States relied on two theories: first, that Santa Fe's sale of SFTT violated § 1392(c) because Santa Fe sold SFTT with the intent to "evade or avoid" its liabilities under the MPPAA; and second, that the sale did not constitute a "change in corporate structure" within the meaning of *29 U.S.C. § 1398*. But it did not tell the

arbitrator (in any meaningful manner that we could discern from the arbitration record) that it was relying on the seventy percent decline issue. Having failed to present the issue to the arbitrator for decision, Central States then addressed it squarely for the first time in its motion to vacate. Still, it failed to support its argument with any evidence which demonstrated that it had calculated the seventy percent decline based on the contribution levels of any entity other than SFTT.[3] Finally, in this motion, Central States has gotten around to identifying the specific evidence which it claims supports its position.

This is a problem, however, for Central States obviously knew about Exhibit 177, and the information it contained relating to the seventy percent decline, at the time of the arbitration hearing. It also knew about Exhibit 177 when it asked this Court to vacate the arbitrator's award. We believe that its failure to identify the evidence supporting its argument about a seventy percent decline before now is inexcusable. This piecemeal presentation of the issue has forced the parties and this Court to consider the issue twice, and, if we remand this issue as Central States requests, it would force the arbitrator to re-open the hearing as well. We are extremely dismayed by the cavalier manner in which Central States has repeatedly wasted the time and energy of everyone involved in this case.

---

[3]As we noted in the Opinion, Central States' argument on this issue in its brief in support of its motion to vacate contained no record citations at all. Opinion at 7.

> And, to make matters worse, we think Central States' argument is wrong. As we said when we first rejected this argument, when SFTT left the Santa Fe control group in 1984, it took its contribution history with it. See § 1398. Unless Central States can establish that SFTT remained in the Santa Fe control group following the sale, a fact that cannot be assumed, Santa Fe had no responsibility for SFTT's contribution levels or withdrawal liability after 1984.

Opinion at 8. Thus, even with the information Central States now offers from Exhibit 177, Central States cannot succeed, for we believe that SFTT's contribution history followed it at the time of the sale. As a result, if Central States wanted to impose withdrawal liability on the Santa Fe control group, which after 1984 was composed solely of Santa Fe Terminal, such liability would have to be calculated on Santa Fe Terminal's contribution history alone.[4] As Central States' chart in its brief shows, this is not the calculation Central States made. (Def.'s Br. at 3.)

Central States argues that the PBGC has expressed the opinion that where a change in corporate structure within the meaning of § 1398 occurs, an "equitable allocation" of the resulting withdrawal liability must be made. Def.'s Br. at 7; see PBGC Op. Letter 92-1, *1992 PBGC-LEXIS 1* (March 30, 1992). Central States misstates the PBGC's position, which is that typically an allocation of the contribution history of the sold entity would be made between all entities which are "successors" within the

---

[4]Santa Fe Terminal is merely another subsidiary of Santa Fe Pacific Corporation. See Def.'s Br. at 3.

meaning of § 1398. PBGC Op. Letter 92-1, 1992 PBGC-LEXIS at *6. Equitable allocation of contribution history is quite different than equitable allocation of withdrawal liability, for once the contribution history is allocated, there may be no withdrawal liability at all. We note also that the factual scenario which forms the basis of the PBGC's opinion is distinguishable from the factual scenario here, for the Santa Fe control group at issue here includes only SFTT and Santa Fe Terminal. Here, there is no "parent" corporation, as there is in the PBGC's hypothetical (see 1992 PBGC-LEXIS at *2), to which some portion of SFTT's contribution history should be allocated due to a history of "large transfers of covered operations or covered employees between members of the controlled group, or other unusual factors" (1992 PBGC-LEXIS at *6). There is only Santa Fe Terminal.[5] We can see no reason why Santa Fe Terminal, which has its own contribution history, should be allocated any portion of SFTT's contribution history.

Central States urges us to apply the PBGC's analysis regarding partial withdrawal liability as well. The PBGC suggests that where a seventy percent decline did not occur "solely because" of a change in corporate structure under § 1398, the sold subsidiary's contribution history must be included in determining the high base year of the parent's control group. 1992 PBGC-LEXIS at *10. This assumes that the sold subsidiary's contribution history stays with the parent for purposes of calculating a seventy

---

[5]Central States, in its briefing earlier and on this motion, is basing its argument on a control group composed of only SFTT and Santa Fe Terminal. See Def.'s Br. at 3.

percent decline under § 1385. However, the PBGC's analysis disregards completely the future operations of the sold subsidiary. As Santa Fe points out, this analysis would result in the imposition of partial withdrawal liability on a seller corporation even if the sold subsidiary had prospered (and all contributions had been paid by the purchaser) after the sale. This results in a windfall to the pension plan, which is paid twice for the unfunded vested pension benefit liability of the sold subsidiary: once by the seller, who pays the partial withdrawal liability, and a second time by the purchaser, who continues all contributions. Since this double payment would not occur if the subsidiary were never sold, we see little reason why it should occur merely because of the sale, where the sale does not result in any interruption of contributions by the sold entity. We do not read § 1385 to require this result.[6] We believe the better interpretation is the one we discussed above: the contribution history of the sold entity goes with it after the sale.[7] This analysis should apply regardless of whether the sold subsidiary flourishes or

---

[6]The MPPAA generally, and § 1385 specifically, are silent on the issue of how to treat the contribution history of an entity that is sold. We believe that our conclusion is consistent with the rationale of § 1398 that "a successor or parent corporation or other entity resulting from any such change [in corporate structure] shall be considered the original employer." *29 U.S.C. §1398.*

[7]We have little doubt that Central States served the notice of withdrawal liability on Santa Fe only because the Rail Services, Inc., control group (which SFTT joined after the sale) never paid SFTT's withdrawal liability, and that Central States would not have assessed partial withdrawal liability on Santa Fe if SFTT had not gone under. Under the analysis it proposes now, however, it was entitled to impose that liability on Santa Fe regardless of SFTT's fate.

fails, since § 1385 does not require that the result depend on such circumstances.

For all of these reasons, we deny Central States' motion on the seventy percent decline issue.

II. The Wisconsin Steel Test

Central States also asks us to reconsider our suggestion that the two-pronged "objective/subjective" test formulated by Judge Moran in *In re Int'l Harvester's Disp. of Wisconsin Steel Litig., 681 F. Supp. 512 (N.D. Ill. 1988)*, is an appropriate guideline for determining a violation of *29 U.S.C. § 1392(c)*. See Opinion at 10. As Central States points out, Judge Moran in fact concluded that where the statutory provision contained language nearly identical to the language of § 1392(c), the objective prong of the test was inapplicable. See *Wisconsin Steel, 681 F. Supp. at 527.*

We agree with both Central States and Judge Moran, and we modify the Opinion regarding use of two-pronged Wisconsin Steel test. The language of § 1392(c), "a principal purpose . . . to evade or avoid liability," focuses on subjective intent alone. The inclusion of the objective prong of the test as a requirement of equal weight to the subjective prong would add to § 1392(c) an additional consideration that is not supported by the language of §1392(c) itself.

We believe, however, that in the vast majority of cases objective facts regarding the viability of the purchaser will carry substantial weight as evidence of the seller's subjective intent. Thus, the objective viability of the purchaser, while not a separate prong entitled to equal

consideration, will generally be a major factor in determining whether a seller had as "a principal purpose" the evasion or avoidance of liability. We believe this approach is consistent with the language of § 1392(c).

Our modification of the Opinion regarding the Wisconsin Steel test does not change the standard we articulated in the Opinion regarding § 1392(c). There we suggested the Wisconsin Steel test only in the context of Central States' argument that the arbitrator should have considered only Santa Fe's subjective intent, not the interest of the McKee-led employee group in purchasing SFTT. Opinion at 10. Thus, our conclusion regarding the proper standard to be applied under § 1392(c) remains the same. See Opinion at 3-5.

We add a caveat here as we did in the Opinion: we offer no opinion on whether the Wisconsin Steel test and the related analysis of subjective intent must be revisited on remand. See Opinion at 10. We have clarified our earlier discussion only to provide guidance; the arbitrator is free to determine if the issue is necessary to his clarification of the standard he applied under §1392(c).

III. Santa Fe's Request for Reconsideration

Although Santa Fe failed to bring its own motion, it asks us to affirm the "sham" standard under § 1392(c) based on this Court's prior ruling in *Banner Indus. Inc. v. Central States Pension Fund, 657 F. Supp. 875 (N.D. Ill. 1987)* and the Seventh Circuit's recent decision in Central States v. Cullum Cos., Inc., No. 91-2844, slip op. (Sept. 1,

1992). We rejected this argument when Santa Fe proposed it in its motion to confirm the arbitrator's award.

Having rejected this argument once, we will not affirm the "sham" standard now. What Santa Fe has done is merely to reiterate the arguments it made in its motion to confirm the arbitrator's award, an inappropriate use of a motion for reconsideration.[8] *United States ex rel. Lynch v. Sandahl, 793 F. Supp. 787, 796 (N.D. Ill. 1992).*[9] What Santa Fe has not done is give us a good reason to change our mind.

Santa Fe has brought to our attention the Seventh Circuit's recent decision in Central States v. Cullum Cos.,

---

[8]We disagree with Santa Fe that this Court's decision in *Banner Industries, Inc. v. Central States, 657 F. Supp. 875 (N.D. Ill. 1987)*, is inconsistent with our Opinion in this case. The issue before us in Banner Industries was not the appropriate standard under § 1392(c), but whether the determination that Banner's sale of its subsidiary's stock to an ESOP caused Banner to cease to be an "employer" under the MPPAA, and whether that question had to be decided by this Court or an arbitrator. *657 F. Supp. at 879-83.* Nothing in that decision constitutes a holding that the language of § 1392(c) requires a finding that a transaction must be a "sham" or "fraud" to violate that provision, which is the position Santa Fe wishes us to take now.

[9]As the Court said in Lynch, "'This Court's opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure.'" *793 F.2d at 796 (quoting Quaker Alloy Casting Co. v. Gulfco Indus., Inc., 123 F.R.D. 282, 288 (N.D. Ill. 1988)).* The argument that we were wrong in rejecting the "sham" standard is more properly addressed to the Court of Appeals. See *Refrigeration Sales Co. v. Mitchell-Jackson, Inc., 605 F. Supp. 6, 7 (N.D. Ill. 1983), aff'd, 770 F.2d 98 (7th Cir. 1985).*

Inc., 1992 WL 209694 (Sept. 1, 1992). As we read that decision, it is neither inconsistent with the standard under § 1392(c) that we articulated in the Opinion nor in any way controlling in this case. Cullum did not address the question of the standard under § 1392(c), for the case did not involve that provision, as the Seventh Circuit noted. 1992 WL 209694, at *6 ("The parties agree that neither [*29 U.S.C. § 1384(a)(1)* nor *29 U.S.C. § 1392(c)*] applies in this case.") The Court mentioned the words "sham transactions" only in considering the arbitrator's express concern that § 1384(a)(1)(A) did not adequately safeguard the pension plan's interests. *Id.*[10] Section 1384 explicitly exempts a "bona fide, arms-length sale of assets" from withdrawal liability. Id. We believe that the standard of "sham" or "fraud" is clearly appropriate under the "bona fide, arms-length" language of § 1384, for the focus there is an objective one. In contrast, § 1392(c) does not

---

[10]The Seventh Circuit's discussion of the "sham transaction" issue states, in its entirety: The third flaw in the arbitrator's analysis is his belief that taking section 1384(a)(1)(A) at face value would 'emasculate the intended purpose of preventing erosion of the plan's contribution base.' Section 1384 taken as a whole does not leave multiemployer pension plans or employees unprotected. The pension plans and employees are protected, but the safeguards appear in other subsections of section 1384 and the MPPAA. For example, the section 1384 exemption applies only to 'bona fide, arm's-length sale of assets to an unrelated party.' *29 U.S.C. § 1384(a)(1)*. Similarly, *29 U.S.C. § 1392(c)* provides that 'if a principal purpose of any transaction is to evade or avoid liability,' the withdrawal liability provisions of the MPPAA 'shall be applied (and liability shall be determined and collected) without regard to such transaction.' These two provisions ensure that businesses cannot avoid withdrawal liability through sham transactions. The parties agree that neither provision applies in this case. 1991 WL 209694, at *6.

exempt a "bona fide, arms-length" transaction; rather, it prohibits any transaction which has as "a principal purpose" the evasion or avoidance of liability. By this language, it focuses on the subjective intent of the seller. We do not read the Seventh Circuit's limited discussion in Cullum as a determination that a transaction must constitute a "sham" or "fraud" to violate § 1392(c).

The standard we articulated in the Opinion, that evasion or avoidance of liability must be a significant or central factor behind a transaction, is less stringent than the "sham" or "fraud" standard which Santa Fe advocates. Obviously, under our standard any transaction which constituted a "sham" or "fraud" would violate § 1392(c); so would a transaction which was not a "sham" or "fraud" but had as "a principal purpose" the evasion or avoidance of liability. The example given by Judge Moran in Wisconsin Steel is illustrative: the sale of a business to a purchaser which is a Fortune 500 company would hardly constitute a "sham" or "fraud" under any common meaning of those terms, but where the seller had as a principal purpose the evasion or avoidance of its liability under the MPPAA, then the transaction would violate § 1392(c) and could be disregarded in determining withdrawal liability. See *Wisconsin Steel, 681 F. Supp. at 527.* We do not believe that this standard is inconsistent with the Seventh Circuit's comment in Cullum.[11]

---

[11]Santa Fe bases its argument in part on our citation to the Sixth Circuit's decision in *Teamster's Pension Trust Fund v. Central Michigan Trucking, 857 F.2d 1107 (6th Cir. 1988).* We cited that case only in footnote 4 of the Opinion, in which we declined to adopt for § 1392(c) the meaning of "sham or fraud" used in the Tax Code, as Santa Fe

(continued...)

Conclusion

We grant Central States' Motion to Alter or Amend Judgment with regard to the Wisconsin Steel test, and we clarify our position on that test in this Opinion. We deny the remainder of Central States' motion. We also deny Santa Fe's "request" that we require the arbitrator to use a "sham" standard under *29 U.S.C. § 1392(c)*.

---

[11](...continued)
urged us to do. In *Teamster's Pension Trust Fund v. Central Michigan Trucking, 857 F.2d 1107 (6th Cir. 1988)*, the Sixth Circuit rejected a similar argument for analogizing to the Tax Code the language of a different section of the MPPAA. Footnote 4 of the Opinion is incorrect to the extent it states that the Sixth Circuit had considered § 1392(c) in that case; we intended to say that the Sixth Circuit is the only circuit to address the argument that the MPPAA should be analogized to the Tax Code and that it has rejected that argument.